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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-799

JEANNE KELLOG SCHWARTZ,
Petitioner,

v.

GEORGE MICHAEL SCHWARTZ,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

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Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

The Petitioner, Jeanne Kellog Schwartz, has requested a writ of certiorari from the Supreme Court of the United States to review a decision of the Maryland Court of Special Appeals which affirmed the trial court decision of the Honorable H. Ralph Miller of the Montgomery County Circuit Court of

Maryland. The Petitioner's prior request for a writ of certiorari to the Court of Appeals of Maryland was denied. The matter was heard at the trial level pursuant to the Respondent's, George Michael Schwartz, request for a civil writ of habeas corpus. The requested writ was granted after full hearing concerning a decree of custody in favor of the Respondent herein from the Eleventh Circuit Court of the State of Florida for Dade County. The chancellor in the trial court of the State of Maryland held that Florida and Maryland had concurrent jurisdiction and, therefore, extended full faith, and credit to the later Florida decree.

JURISDICTIONAL STATEMENT

The Respondent concurs that if the Supreme Court of the United States has jurisdiction that it is based upon 28 U.S.C. 1257 (3), in that this case involves, in part, an interpretation by the Court of Special Appeals of Maryland the application of Article IV, section one, of the Constitution of the United States. However, the Respondent specifically reserves the right to challenge the above jurisdictional basis and in accordance with Rule 24 of the Supreme Court of the United States will present , Motion to Dismiss in Argument VI of this brief.

QUESTIONS PRESENTED

1. Was it a violation of the Full Faith and Credit Clause of the United States Constitution for the State of Florida to reverse a prior Maryland decree of custody wherein each state had concurrent jurisdiction as to the subject matter and where the Florida decree was later in time?

2. Does the Full Faith and Credit Clause of the United States Constitution require the State of Maryland to endorse a doctrine of retaliation in a writ of habeas corpus proceeding so as to ignore a valid and later decree from the State of Florida based solely on that state's alleged refusal to recognize a prior Maryland decree?

3. Has the Petitioner herein presented a cause which was decided below on the basis of a substantial federal question not heretofore decided by the Supreme Court, or in the alternative, a cause which was decided below contrary to prior decisions of the Supreme Court; and which decision does not rest on an otherwise adequate, but non-federal basis?

STATEMENT OF THE CASE

This cause concerns a habeas corpus proceeding from the Montgomery County Circuit Court, sitting as a Court of Equity, with the Honorable H. Ralph Miller presiding and which proceeding culminated a lengthy and acrimonious history of litigation centering upon a nine (9) year old daughter. The complexity of the legal issues and the interconnection of the Florida and Maryland Circuit Courts dictate the necessity for careful factual analysis.

The Petitioner and Respondent were married in the State of Florida on June 15, 1956, and were subsequently divorced in Miami, Florida, on November 30, 1964. Thereafter, the parties continued to reside together in the same home which resulted in the birth of Candie Schwartz on February 17, 1966. The Petitioner maintained her Florida residence until March of 1971, at which time she returned to the home of her estranged parents in Bethesda, Montgomery County, Maryland.

Thereafter on June 16, 1971, the Petitioner caused to be filed in the Montgomery County Circuit Court a Bill of Complaint for custody and Child Support in addition to an Ex-Parte Injunction and Show Cause Order. This litigation was commenced immediately after the Petitioner, through hired detectives, forcibly removed the minor child from her school yard in Florida wherein the child had been enrolled pursuant to an oral agreement between the parties. The issues were properly joined in the Montgomery County Circuit Court on August 27, 1971, when the Respondent filed an Answer through his then local counsel. A subsequent Cross Bill of Complaint for Custody was filed by the Respondent on October 29, 1971. A *pendente lite* hearing was held on December 9, 1971, at which time *pendente lite* custody was awarded to the Petitioner and *pendente lite* visitation was awarded to the Respondent. This award ended a six (6) month hiatus in visitation between the Respondent and the minor child which had commenced at the filing of the Petitioner's initial pleadings. A subsequent hearing to specify visitation procedure was conducted at the Respondent's request on March 17, 1972, resulting in a modified Order of Court. Visitation was again unilaterally terminated by the Petitioner in May of 1972 following the filing by her of a Petition for Contempt on May 18, 1972. A hearing was held on November 1, 1972, at which time visitation was commenced, again ending a six (6) month hiatus in visitation between the Respondent and the minor daughter.

The Petitioner on March 6, 1973, abruptly absconded from the State of Maryland with no prior notice to the Respondent, her attorneys, or the Court. The Respondent filed a Petition for Contempt on March 29, 1973, which was heard before the Honorable H. Ralph Miller on May 14, 1973.

The Petitioner and the minor child were not present at that hearing which was attended by the Respondent, counsel for both parties, and the parents of the Petitioner. The Petitioner later claimed that she had never been informed of the hearing date by her attorney, who disclaimed knowledge of her whereabouts at the hearing, even though she alleged he knew how to contact her. The Court at the hearing transferred custody, *sua sponte*, to the Respondent which Order was signed and filed on May 15, 1973.

Subsequent thereto, the Respondent, at great personal expense and through a private detective, located the Petitioner and minor child in Pasadena, California. Physical control of the child was obtained by the Respondent in accordance with the May 15, 1973, Court Order on May 23, 1973, in Pasadena, California.

The Respondent thereafter returned to his Florida residence with the minor child. Prior to his actual arrival in Florida and pursuant to telephone instruction, Respondent's Florida counsel filed a Petition for Custody and Other Relief in the Circuit Court for Dade County, Florida, on July 24, 1973. Prior to this date and on June 5, 1973, the Petitioner filed a Petition to Restore Custody in the Montgomery County Circuit Court. This action was also heard by the Honorable H. Ralph Miller on July 26, 1973, which was two (2) days subsequent to the Respondent's initiation of action in the Dade County Circuit Court. The Respondent did not personally attend the Maryland hearing, but did challenge the jurisdiction of the Montgomery County Circuit Court through a Motion to Dismiss based on the theory that neither the Respondent, Petitioner, nor the child at the time of said hearing were residents or domiciled in Maryland. This Motion

was denied as was counsel's subsequent oral Motion to Strike Appearance. The Petitioner was thereafter awarded *pendente lite* custody which was modified to final custody on August 30, 1973, after receipt and review of custody investigation.

Prior to the Montgomery County Circuit Court Order of August 30, 1973, and on August 13, 1973, the Dade County Circuit Court through the Honorable Shelby Highsmith issued a Reciprocal Restraining Order which prevented either party from removing the minor child from Dade County pending the termination of the Florida litigation.

Sometime prior to September 19, 1973, the Petitioner traveled to Florida in the company of the same private detective hired by her in 1971 when the child was forcibly removed from her Florida school playground. Subsequent thereto and after abortive attempts to forcibly remove Candie, the Petitioner retained Florida counsel and filed a Writ of Habeas Corpus on September 21, 1973. A hearing on the Petitioner's Writ of Habeas Corpus was held before Judge Featherstone of the same Court wherein custody was temporarily relinquished to the Petitioner by the Respondent to prevent the child's incarceration at a Youth Detention Center. The Respondent's Petition for Custody and Other Relief and the Petitioner's Writ of Habeas Corpus were consolidated without objection for hearing before the Honorable Shelby Highsmith on September 28, 1973. As will be more fully discussed in argument, each party appeared and was represented by independently selected counsel and were each accorded full opportunity for the first time to fully explore the custodial issue. Subsequently, a Final Judgment Awarding Custody was signed by Judge Highsmith on October 2, 1973, which, *inter alia*, granted final custody to the

Respondent with liberal visitation afforded to the Petitioner. No appeal was ever requested or taken from this decision.

Thereafter, Candie Schwartz visited with the Petitioner pursuant to the Florida decree from December 21 to December 28, 1973, in Pasadena, California. Written arrangements by letter were forwarded by the Petitioner to the Respondent concerning this uneventful visitation.

A subsequent summer visitation was arranged again by written communication in accordance with the Florida decree. These arrangements outlined visitation with the Petitioner in Pasadena, California, from June 17 to July 31, 1974, which was the forty-five (45) day period prescribed in the Florida decree. On this occasion, however, the Petitioner once again absconded with the minor child and without prior notice to the Respondent who had traveled from Florida to retrieve the child. The Petitioner was rediscovered in the home of her parents in Bethesda, Maryland, on July 30, 1974. Thereafter, on August 22, 1974, the Respondent filed a Writ of Habeas Corpus in the Montgomery County Circuit Court. The Writ was issued the following day by the Honorable Ralph G. Shure, Chief Judge of the Circuit Court for Montgomery County. A subsequent hearing was held before Judge Miller on October 31, 1974, which was attended by the Respondent, the Petitioner, and their respective counsel. An Answer to the Writ of Habeas Corpus was filed on the day of the hearing. On November 1, 1974, Judge Miller signed an Order affirming the Writ of Habeas Corpus and requiring that the minor child be returned to the Respondent within forty-eight (48) hours of 3:00 o'clock P.M. on October 31, 1974. The Petitioner refused to relinquish the minor child on November 2, 1974, and subsequently, filed a line noting an appeal to the Court

of Special Appeals of Maryland on November 4, 1974, in addition to a Stay of Execution which was granted by Judge Miller in a later hearing and which expired on January 4, 1975. The Respondent removed the minor child from Maryland to Florida on December 16, 1974.

The Court of Special Appeals of Maryland affirmed the decision of the trial court in an opinion which is reported in 26 Md. App. 427, 338 A.2d 336 (1975) and which is fully set forth in Appendix A of the Petitioner's brief. The Court of Appeals of Maryland denied the Petitioner's request for a writ of certiorari which order is fully set forth in Appendix B of the Petitioner's brief.

THE WRIT OF CERTIORARI SHOULD BE DENIED

The Respondent in his research for the preparation of this brief did not discover any case wherein the Supreme Court had granted a writ of certiorari in connection with a child custody case. It is apparent that the reason therefor is that in child custody cases the issue of full faith and credit is usually of a corollary or periphery nature and not one of essential necessity to the rendering of the decision. The Supreme Court has more than tacitly recognized the inapplicability of the standard concept of full faith and credit to child custody cases. *May v. Anderson*, 345 U.S. 528, 97 L.Ed. 1221, 73 S.Ct. 40 (1952). The Petitioner's attempt to interject into the question of full faith and credit the secondary issue of change in circumstances adds no meaningful inquiry. Rather than being an issue that the Supreme Court has specifically reserved, it appears to the Respondent to be one specifically ignored. The Petitioner does not read *Ford v. Ford*, 371 U.S. 187, 9 L.Ed. 2d 240, 83 S.Ct. 273 (1962) to be in any

manner dispositive of the issue. Nor does the Petitioner in any manner agree that a denial of a writ in other cases indicates a predisposition by the Supreme Court to reserve the issue for further review. *Berlin v. Berlin*, 21 N.Y. 2d 371, 288 N.Y.S. 2d 44, 235 N.E.2d 109 (1967), Remitted and Amended 21 N.Y.2d 970, 237 N.E. 2d 358 (1968), cert. den. 393 U.S. 480, 21 L.Ed.2d 111, 89 S. Ct. 118 (1968).

It is apparent that in this case the decision to apply full faith and credit was essentially a factual inquiry at the trial level. The issue of a change in circumstance, or the lack thereof, is only one of several such factual inquiries. The case herein was not a changed circumstances inquiry but rather a modification by one state of a prior existing decree from another state. As such, it is not subject to review by the Supreme Court on the basis of Article IV, section one, of the United States Constitution as will be more fully discussed in Argument VI of this brief. It is necessary at the outset to first demonstrate the validity of the action by the trial court in granting the writ of habeas corpus.

ARGUMENT

I.

THE FLORIDA COURT HAD IN PERSONAM JURISDICTION.

The Supreme Court is in complete accord with the Maryland authorities in conjunction with the jurisdictional issue. As was stated in *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 1 L.Ed. 2d 1456, 77 S.Ct. 1360 (1957):

> It has long been a constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

See also *Estin v. Estin*, 334 U.S. 541, 92 L.Ed. 1561, 68 S.Ct. 1213 (1948); *William v. North Carolina*, (I) 317 U.S. 287, 87 L.Ed. 279, 63 S. Ct. 207 (1942); *Williams v. North Carolina*, (II) 325 U.S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092, Reh. Den. 325 U.S. 895, 89 L. Ed. 2006, 65 S. Ct. 1560 (1945); and *Coe v. Coe*, 334 U.S. 378, 92 L.Ed. 1451, 68 S.Ct. 1094 (1947).

Probably the most often cited Maryland case concerning the question of domicile and jurisdiction is *Miller v. Miller*, 247 Md. 358, 231 A.2d 27 (1967). The principal contention advanced by the Appellant in that case was that because the Maryland court was required to extend full faith and credit to a Florida custody decree that Maryland had no jurisdiction to enter any further orders. The Court of Appeals in sustaining this position stated at pages 362-365:

> As to the merits, the conclusion of the lower court that it had jurisdiction over the children because it had jurisdiction over the parents was erroneous and must be reversed. Rather, since the children were neither present nor domiciled in Maryland, it is clear that the court was without jurisdiction to either pass an order concerning the right of the father to visit and communicate with the children or to find the mother in contempt for failing to comply therewith.
>
> In *Zouck v. Zouck*, 204 Md. 285, 104 A.2d 573 (1954) and *Naylor v. Naylor*, 217 Md. 615, 143 A.2d 604 (1958), we recognized the "domicile" rule set

forth in the Restatement, *Conflict of Laws*, § 117, to the effect that a state court has jurisdiction to determine custody of a child only if the domicile of the child is within the state. See also *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380 (1965). As was pointed out in *Zouck*, at p. 302:

> 'The term jurisdiction imports not only power over the parties to the action but the right to adjudicate as to the subject matter in a given case. *In matters of custody, jurisdiction of the person who seeks custody is not enough. There must be jurisdiction over the one of whom custody is sought for the court to have jurisdiction of the subject matter.*' [Italics ours.]

This is so because as we said in *Nelson on Divorce*, 2nd ed., § 15.32 at p. 287:

> 'A proceeding to determine custody of a minor child partakes of the nature of an action in rem, the res, or the subject matter, being the child's status or his legal relationship to another. *If the court does not have jurisdiction of the children it does not have jurisdiction of the subject matter to determine the right to custody as between the parties even though it does have jurisdiction of the parties, who are the parents of the children.*' [Italics ours.]

Also see Nelson, op. cit., § 33.62; Beale, *Conflict of Laws*, Vol. 2, § 144.13.

> 'The law, therefore, is settled that absent jurisdiction over children, a court has neither the power nor a right to judicially determine questions concerning custody and visitation rights. And, for the same reason in this instance,

the rule would apply to a contempt proceeding arising out of failure to comply with an order in either of the other respects.

Whether or not the Maryland court was required to give full faith and credit to the Florida custody decree necessarily depends on whether the children were domiciled in that state. And this fact, in turn, depends on whether the mother was domiciled there at the time the order granting the father visitation and communication rights was passed.

* * * * * * * *

The domicile of children, ordinarily, is the same as that of both or one of the parents. In the case of a separation or divorce, the domicile of a child is that of the parent to whom legal custody has been awarded; if custody has not been determined and if it lives with neither of the parents, the child retains the domicile of the father, *Ross v. Pick*, 199 Md. 341, 86 A.2d 463 (1952). Also see *Taylor v. Taylor*, 246 Md. 616, 229 A.2d 131 (1967) and *Rethorst v. Rethorst*, *supra*.

The domicile of a parent or parents, however, is always determined by his or her place of residence coupled with intention that it be permanent and not temporary. In *Shenton v. Abbott*, 178 Md. 526, 15 A.2d 906 (1940), at p. 530, 'domicile' is defined as 'that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the

> intention of returning.' The same definition is quoted in *Lee v. Green*, 195 Md. 462, 468 73 A.2d 889 (1949) and *Shapiro v. Marcus*, 211 Md. 83, 85 124 A.2d 846 (1956). In *Shenton*, *Lee* and *Shapiro*, it was also stated that in order to effect a change of domicile, there must be an actual removal to another habitation, coupled with an intention of remaining there permanently or at least for an unlimited time. And in *Shenton* and *Lee*, but not in *Shapiro*, it was said that while a person may have several residence, he can have only one domicile at a time and that the essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere.'

Rethorst v. Rethorst, 214 Md. 1, 133 A.2d 101 (1957), concerned an action in Maryland wherein Mrs. Rethorst had obtained a custody award over her two (2) children which was subsequent to a California custody decree granting custody of the minor son to Mr. Rethorst and custody of the minor daughter to Mrs. Rethorst. The husband was domiciled in California; but the wife was served with summons, was represented by counsel, appeared personally, offered testimony, and otherwise fully participated in the husband's California litigation. The Maryland Court of Appeals in holding that the California decree was entitled to full faith and credit stated at page 13:

> Reprehensible as Mr. Rethorst's conduct in taking the children from the mother by what amounts to trickery may have been, all of the facts on that matter could have been presented (and, we believe, were presented) to the California court. The parents and the children were all within its territorial jurisdiction, no final adjudication of the rights of

custody had been had in Maryland (only an ex parte, interlocutory order had been signed), and Mrs. Rethorst appeared personally in the California suit and participated fully in those proceedings. No matter how much we may deplore a determination which has the effect of rewarding the husband's trickery, the judgment of the California court concludes the question of custody and is entitled to full faith and credit here, and is not subject to collaterial attack. As is said in the *Restatement, Conflict of Laws*, Chapter 5, Section 147, Comment a, pp. 212-213; 'An award of custody, like any other judgment or decree of a competent court, is entitled to recognition and enforcement in other states. *** It is, therefore, conclusive of the status of the child at the time the decree was rendered and the merits of such an award cannot be re-examined either in the state where rendered or in another state.'

See also *Epstein v. Epstein*, 193 Md. 164, 66 A.2d 381 (1948); *Hall v. Hall*, 238 Md. 191, 208 A2d 593 (1964); *Van Wagenberg v. Van Wagenberg*, 241 Md. 154, 215 A.2d 812 (1965); *Miller v. Miller, supra.*

Thus, the Court of Special Appeals held as a matter of law that Florida had the necessary jurisdiction to enter its decree. It is clear that this decision was not in conflict with any jurisdictional decisions of the Supreme Court. It is now necessary to examine the means by which the Court of Special Appeals reached the further conclusion that Maryland also had jurisdiction, so that there was concurrent jurisdiction in each state to act.

II.

THE MARYLAND COURT HAD CONTINUING JURISDICTION.

It is necessary then to analyze a second doctrine of jurisdiction which is known as the continuing jurisdiction rule to ascertain its effect on the jurisdictional issues herein. The most recent pronouncement of this doctrine in Maryland is found in *Seidlitz v. Seidlitz*, 23 Md. App. 327, A.2d 779 (1974), at pages 334-336:

> The jurisdiction over children which a Maryland court must have before it can determine questions concerning custody, visitation rights, and support of the children need not be newly acquired in connection with the relief currently sought; it may be a continuation of jurisdiction acquired and exercised earlier.

In *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380 (1965), a mother, who had been awarded a divorce and child custody by a Maryland decree, and who had later established her domicile, and that of the children, in New York, argued that the continuing jurisdiction of the Maryland court could be exercised only under circumstances which would authorize the court to take jurisdiction in the first place.

The Court of Appeals rejected that narrow view of continuing jurisdiction. It said, at p. 56-57:

> 'Although we recognized the domicile rule set forth in the Restatement, *Conflict of Laws*, § 117, in *Naylor v. Naylor*, 217 Md. 615, 143 A.2d 604 (1958), and in *Zouck v. Zouck*, 204 Md. 285, 104 A.2d 573 (1954),

we were not concerned in either of those cases, as we are here, with the modification of an award of custody made by a court which by its decree (pursuant to statute) had reserved the right to make further orders. Where we have said that jurisdiction to determine custody depends on the domicile of the child we were concerned with the power of the court to award custody in the first place.

The majority of courts in other states have adopted the continuing jurisdiction rule. We shall do likewise. The theory of this rule is that when a custody decree is subject to subsequent modification for any reason (either under the provisions of a statute or the terms of the decree itself), the jurisdiction of the court in the awarding state should remain notwithstanding the removal of the child to another state.'

We have cited and quoted from *Berlin* to make it clear that the *continuing* jurisdiction which a Maryland court has over matters relating to children must stem from an earlier proceeding in which the Maryland court had and exercised that jurisdiction. It is, in other words, the power which a Maryland court has to modify *its* decree or order. On the other hand, a *later acquired* power in a Maryland court to modify a decree or order of another state relating to children exists only when the Maryland court has jurisdiction over the children because they are presently domiciled here.

The true relationship between the continuing jurisdiction of the state which entered the original

decree and the later acquired jurisdiction of the state of present domicile of the children was illustrated in *Taylor v. Taylor*, 246 Md. 616, 229 A.2d 131 (1967). There the Court of Appeals said, at 618-19:

> 'The question before the Court is whether the courts of this State have jurisdiction relating to the protection and care of infants, domiciled in Maryland, where there is a subsisting order from a prior hearing in another state with original jurisdiction, awarding custody of the infants and setting forth the conditions of such custody and terms for their support.
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> * * * * * * *
>
> 'It is a well-established principle of law that the state in which an infant is domiciled has jurisdiction over it. Maryland has so provided by statute, Art. 16, § 66(a), Code (1957), which is merely declaratory of equity jurisdiction, *Coleman v. Coleman*, 228 Md. 610, 613, 180 A.2d 875, 877 (1962); cf. *Rethorst v. Rethorst*, 214 Md. 1, 133 A.2d 101 (1957), and as a corollary to this proposition, as stated by this Court in *Berlin v. Berlin*, 239 Md. 52, 55, 210 A.2d 380, 381 (1965), 'the domicile of a minor child, in case his parents are divorced, is that of the parent to whom legal custody has been awarded. * * *' In *Rethorst*, it is interesting to note that Maryland upheld the jurisdiction of the California court in a custody case, in which the infant children involved were physically present with their mother in Maryland, although they were domiciled in California.'

> The Chancellor below in *Taylor* felt that the full faith and credit clause, Article IV, § 1 of the Constitution of the United States, foreclosed action in Maryland in matters dealt with in the California decree. The Court of Appeals disagreed, holding that the court had jurisdiction because the children were domiciled here, and remanded the case for hearing and determination of the merits.

It is, therefore, clear that Maryland likewise had jurisdiction in this case involving child custody.

III.

THE FLORIDA AND MARYLAND COURTS HAD CONCURRENT JURISDICTION AND FLORIDA THEREFORE WAS ENTITLED TO ENTER ITS CUSTODY DECREE.

The doctrine of concurrent jurisdiction is well recognized at all judicial levels:

> A court may have exclusive jurisdiction to adjudicate particular kinds of cases, or its jurisdiction in this respect may be concurrent with the jurisdiction of another court.
>
> Where a crime has been committed partly within the territorial ambit of one jurisdiction and partly within the territorial ambit of another jurisdiction, the power to adjudicate the alleged crime is vested concurrently in the courts of either of those jurisdictions. Similarly, where a tort is committed in one state but causes injury in another state, the action may be brought in a court of either state. In

> certain cases common-law and equity jurisdiction may be concurrent, and probate jurisdiction may be concurrent with general equity jurisdiction.
>
> In the absence of a constitutional restriction, the legislature may vest certain courts with concurrent jurisdiction, as it may vest certain courts with exclusive jurisdiction over certain kinds of cases. But the mere grant of jurisdiction to a certain court, by constitution or legislation, does not create exclusive jurisdiction in that court in the absence of a specific provision to that effect.

20 Am. Jur. 2d, Courts, Section 106.

The independent right of both Florida and Maryland to act in this case has been heretofore clearly established. This concurrent right to act must now be examined in light of the Petitioner's actions to determine the effect of her conduct on her subsequent jurisdictional challenge.

IV.

THE PETITIONER WAIVED HER RIGHT TO CHALLENGE THE FLORIDA DECREE AND IS ESTOPPED FROM DENYING ITS VALIDITY.

Waiver and estoppel are actually separate legal doctrines whose distinction is inherently manifested in this case. The Court of Appeals of Maryland has had a recent occasion to carefully and exhaustively distinguish the doctrines in the case of *Canaras v. Lift Truck Services*, 272 Md. 337, 322 A.2d 866 (1974). The facts in *Canaras* are inapposite and not relevant. The definition and application of the law therein is in accordance with the views of the Supreme Court expressed in

Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). The Maryland Court of Appeals at 357-362 stated as follows:

> A waiver is the intentional relinquishment of a known right, or of such conduct as warrants an inference of a relinquishment of such right. A waiver, strictly so called, is the result of an intentional relinquishment of a known right. *Enterprise Mfg. Co. v. Oppenheim,* 114 Md. 368, 402, 79 A. 1007, 1012 (1911). See also *Nichols v. Cities Serv. Oil Co.,* 171 F. Supp. 400, 409 (D. Md. 1959); *Schindel v. Danzer,* 161 Md. 384, 396-97, 157 A. 283 (1931).

* * * * * * * *

Judge Horney, writing for the Court in connection with the terms 'waiver' and 'estoppel,' stated:

> 'There is even confusion in the use of the terms 'waiver' and 'estoppel.' Many law writers and courts make no effort to distinguish them and use the terms interchangeably. A clarification may not be amiss. When a seller has promised to convey land on the express condition that payment of the purchase price must be made on or before a specified date, payment on time is the condition which a buyer must perform. But, if the seller merely states to the buyer that he does not insist on timely payment, he thereby eliminates the condition, and such statement constitutes a 'waiver.' (Footnote omitted) Being the seller's voluntary action, it is not necessary for the buyer to give any consideration for the waiver, or that the buyer change his position in reliance thereon,

> in order for the waiver to be legally effective. If, however, the seller foresees or should have foreseen that the buyer would materially change his position in reliance on the waiver, and the buyer does so, then the seller is 'estopped.' The seller's action is still a 'waiver,' but the resulting action in reliance thereon by the buyer creates the 'estoppel.' Thus, 'waiver' consists of the voluntary action of the seller alone, while an 'estoppel' requires the action of both the seller and the buyer. (3. For an exposition of the difference between a 'waiver' and an 'estoppel,' see 3 *Corbin, Contracts,* Sec. 752; *Colbath v. H. B. Stebbins Lumber Co.,* 127 Me. 406, 144 A. 1 (1929); and *Northwestern National Life Ins. Co. v. Ward,* 56 Okla. 188, 155 P. 524 (1915).'

* * * * * * * *

In *Food Fair Stores, Inc. v. Blumberg,* 234 Md. 521, 200 A.2d 166 (1964), our predecessor stated:

> 'Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances. *Gould v. Transamerican Associates,* 224 Md. 285. And acts relied upon as constituting a waiver of the provisions of a contract must be inconsistent with an intention to insist upon enforcing such provisions. *Maryland Casualty Co. v. East Balt. Driving Ass'n.,* 135 Md. 105. 234 Md. at 531, 200 A.2d at 172.'

> A waiver may be either verbal or in writing; and it is not necessary that the waiver should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. The assent must, however, be clearly established and will not be inferred from doubtful or equivocal acts or language. 5 S. Williston, Law of Contracts § 678 (3rd ed. 1961).

This distinction was discussed by the Court of Appeals of Maryland in *McPhail v. Sanger*, 266 Md. 318, 293 A.2d 257 (1972) at page 331:

> The question of equitable estoppel was discussed at length and in depth in *Crane Co. v. Onley*, 194 Md. 43, 49-50, 69 A.2d 903, 906 (1949). This Court there said:
>
> 'In the case of *Benson v. Borden*, 174 Md. 202, 198 A. 419, Judge Mitchell discusses the difference between waiver and estoppel, often used synonymously. He quotes at pages 219 and 220 of 174 Md., at page 427 of 198 A. from 40 Cyc. 255: 'While waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. * * * Waiver is the voluntary surrender of a right; *estoppel is the inhibition to assert it from the mischief that has followed.* Waiver involves both knowledge and intention; *estoppel may arise where there is no intent to mislead.* Waiver depends upon what one himself intends to do; *estoppel depends rather upon what he causes his adversary to do.* Waiver involves the acts and conduct of only one of the parties; *estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position; an estoppel always involves this element.* * * * Estoppel may carry the implication of fraud, waiver does not. A waiver may be created by acts, conduct or declarations insufficient to create a technical estoppel.' (Emphasis supplied.)

The Supreme Court in an analogous situation concerning a divorce proceeding held:

> [T]he requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by a defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues. . . .
>
> . . . If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister state on a decree valid in the State in which it was rendered.

Schener v. Schener, 334 U.S. 343, 92 L.Ed. 1429, 68 S.Ct. 1097 (1948), at 351-352.

The Supreme Court has thus clearly recognized the distinction between waiver and estoppel. It, therefore, is necessary to determine whether the Petitioner was afforded her right of full participation in the Florida proceedings.

It is clear that the Petitioner was afforded her full opportunity for hearing in connection with the jurisdictional issues that she now so vehemently attacks. The record before the trial court was clear that the Florida proceedings were intended by both parties as a final resolution of all issues. Prior to the Florida hearing there had never been an adversary proceeding wherein each party was permitted to fully explore the custody issue in the presence of the other with full opportunity to confront and cross examine their respective viewpoints on custody and the welfare of the child. Prior to the Florida hearing the minor child had been 'snatched' on four (4) separate occasions from three (3) different states. Prior to the Florida hearing the parties had been involved in continual litigation and hearings for over three (3) years. Prior to the Florida hearing the minor child had been enrolled in schools in three (3) different states. Prior to the Florida hearing the Respondent and Petitioner had not meaningfully communicated nor discussed with each other the welfare and interest of the child.

There is simply no question that the Petitioner was afforded ample opportunity to litigate all issues in the Florida forum. Judge Miller at the trial level characterized the Florida proceedings as follows:

> There is a writ of *habeas corpus* in which the petitioner, the defendant, asked to have full faith and credit extended to the final decree of Florida State, based on concurrent jurisdiction and that being the latest decree; and the Court will have to decide the question whether that decree is entitled to full faith and credit, because there is some allegation that the plaintiff wife went to Florida only to enforce her Maryland decree.

The Court will take into consideration, also, that the Florida decree is the only decree of this Court, excepting the first *pendente lite* order to the wife, where the parties were ever really both before the court to litigate their problems.

The Court is not at all happy about what has occurred in this case, particularly with regard to the plaintiff, Mrs. Schwartz. I am not happy, either, with Mr. Schwartz, who did not appear for the custody hearing here. But the home investigation was done on the basis of the California home, and the next thing I know, there is litigation going on in another State and then the wife is back here with her parents.

This child cannot be dragged all over the United States, and I think that the parties did just what was right; and I am not at all convinced by the wife's testimony that at the time she did not believe that, also. They got together and they litigated the matter, and obviously she is unhappy with the result. There is not any doubt in my mind that she initially went down to Florida simply to enforce her Maryland decree; but the exhibits seem patently clear to me, that once down there they resolved their differences and decided to let that court decide the issue of custody.

I am keeping in mind that this was the first time that had really occurred. It is a later decree, and the Court holds that the Florida court clearly had jurisdiction, concurrent jurisdiction with this State and that it was not just a simple matter of enforcing the Maryland decree. Neither party was a resident of this State at that time and, although the Berlin case indicates that the Court can have continuing jurisdiction, there was almost a surrender of jurisdiction in this case when they went before the Florida court.

I think that is most clearly expressed by the fact that the wife abided by the Florida decree for some time after that, until apparently, at least according to her, the child did not want to return, played on her sympathy and emotions, and she decided apparently to seek other legal advice.

The fact that she did not agree with the Florida attorney is no matter of defense. The Florida decree was passed when both parties were before the court and when, quite obviously from the exhibits, a statement was made by the judge in his decree – and it was based on the testimony and participation of the parties – that they wanted to lay to rest forever their troubles. That is just exactly what they did.

V.

THE CHANCELLOR BELOW WAS CORRECT IN EXTENDING FULL FAITH AND CREDIT TO THE FLORIDA DECREE SINCE MARYLAND CANNOT IGNORE A DECREE OF ANOTHER STATE EVEN ASSUMING THAT STATE DENIED FULL FAITH AND CREDIT TO AN EARLIER MARYLAND DECREE.

The Mary'and Court of Appeals has had opportunity to directly consider the issue of whether or not Maryland courts must extend full faith and credit to a sister state decree wherein the latter has refused full faith and credit to a prior Maryland decree. This doctrine of retaliation as suggested by Petitioner has been expressly and flatly rejected in Maryland. The case of *Johnson v. Johnson,* 199 Md. 329, 86 A.2d 520 (1952) is directly dispositive of the question. This case involved a wife who had previously obtained a divorce *a*

mensa et thoro on November 15, 1948, from the Circuit Court for Baltimore City, Maryland, 'apparently' based on the fault of the husband (the entire record was not before the Court of Appeals). The husband on January 18, 1950, obtained a decree of divorce *a vinculo matrimonii* from the Dade County Circuit Court of Florida on the grounds of the wife's cruelty. The Court of Appeals in *Johnson v. Johnson, supra,* characterized the plaintiff-wife's grounds for appeal at page 333:

> Plaintiff alleges 'that the facts on which the claim of cruelty was based are identical with the defense asserted by [defendant] in defense of the Maryland * * * case, which defense was decided * * * adverse [sic] to [defendant]'; that nothing alleged in the Florida bill or proved in the Florida proceedings 'occurred subsequent to the Maryland decree of November 15, 1948'; that the Maryland decree has already determined the matters and issues therein involved in favor of plaintiff the matter was *res judicata*, and, hence, the Maryland decree was entitled to full faith and credit by the Florida court and that plaintiff there defended on those grounds. Plaintiff does not allege that defendant was not a resident of Florida or that she denied jurisdiction of the Florida court on that ground.

The Court of Appeals in rejecting the above contentions stated at page 336:

> Plaintiff's basic purpose, in her application for *certiorari,* is to obtain a reversal of the Florida divorce decree as involving a denial of full faith and credit to the Maryland decree. This is the proper way to raise this question, i.e., by direct appeal from the Florida Supreme Court to the Supreme Court of the

United States. *Thompson v. Thompson,* 226 U. S. 551, 33 S.Ct. 129, 57 L. Ed. 347; *Davis v. Davis,* 305 U. S. 32, 40, 59 S.Ct. 3, 83, L.Ed. 26. Though pursuing the proper remedy, plaintiff also suggests that the Maryland courts might ignore the Florida decree because it denied full faith and credit to the earlier Maryland decree. This suggestion is groundless. As the New York Court of Appeals said in *Lynn v. Lynn,* 302 N.Y. 193, 97 N. E. 2d 748, 751, 'Nevada's asserted denial of full faith does not justify or permit retaliation by any other state. As the decisions make plain, plaintiff's only remedy to correct the alleged error was by direct appeal from the Nevada judgment through the Nevada courts, and, if necessary, to the Supreme Court of the United States. See *Morris v. Jones,* 329 U.S. 545, 552, 67 S.Ct. 451, 91 L.Ed. 488; *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 77, 60 S.Ct. 44, 84 L.Ed. 85; *Roche v. McDonald,* 275 U. S. 449, 455, 48 S.Ct. [142], 143, 72 L.Ed. 365; *Fauntleroy v. Lum,* 210 U. S. 230, 237, 28 S.Ct. 641, 52 L.Ed. 1039; see also *Estin v. Estin, supra,* 296 N. Y. 308, 312 73 N. E. 2d 113, 114, affirmed 334 U. S. 541, 68 S.Ct. 1213 [92 L.Ed. 1561]; *Restatement, Judgments,* § 42, Comment a, p. 165.' This concise statement is fully supported by the Supreme Court cases cited.

See also *Ross v. Pick,* 199 Md. 341, 86 A.2d 463 (1952).

> In accord with the rules pertaining to judgments generally, the question whether a decree or judgment entered in an action for a divorce or separation may be attacked collaterally in the state in which it was rendered or elsewhere depends primarily upon whether it is void or is merely erroneous as to a matter which does not affect the jurisdiction of the court. That is to say, in a divorce or separation case, a judgment which is void for want of jurisdiction is

> subject to collateral attack, but a judgment which is merely voidable because of errors of law or irregularities which do not affect the jurisdiction of the court is not subject to collateral attack. Errors and irregularities in practice, even if grave enough to require reversals of divorce decrees on appeal, do not invalidate such decrees so as to render them susceptible to collateral attack.

24 Am. Jur. 2d, Divorce and Separation, Section 477.

VI.

THE PETITIONER HAS NOT PRESENTED A CAUSE WHICH IS THE PROPER SUBJECT FOR A WRIT OF CERTIORARI.

The discretionary nature of a writ of certiorari to the Supreme Court of the United States is a well accepted principle. See for example *Fay v. Noia,* 372 U. S. 391, 9 L.Ed. 837, 83 S.Ct. 822 (1962). This concept is so well recognized that it is also embodied in Rule 19 of the Supreme Court Rules of Procedure. The scope of the review permitted to the Supreme Court on a writ of certiorari is whether the lower court has committed an error of law. Issues or questions of fact are not subject to review. *Bandini Petroleum Co. v. Superior Ct.,* 284 U. S. 8, 76 L.Ed. 136, 52 S.Ct. 103 (1931), 78 ALR 826. Thus, a state court decision must fall within the statutory categories in order to be a proper subject of review. *Hunter Co. v. McHugh,* 320 U. S. 222, 88 L.Ed. 3, 64 S.Ct. 19 (1943). It is generally conceded that the Supreme Court and the Federal Courts do not have jurisdiction in 'domestic relations' cases. *Brandtscheit v. Britton,* (DC Cal.) 239 F Supp. 652. However, a domestic relations case may otherwise qualify if it in some manner involves an issue

concerning the validity of a federal statute or of the United States Constitution. 28 USC § 1257.

The Respondent would concede that the instant case involves an application of the Full Faith and Credit Clause. However, this alone is not determinative of the existence of a federal question since to qualify as such the issue must meet the further test of being a basic or fundamental issue as opposed to a collateral one. *Gully v. First Nat. Bank*, 299 U. S. 109, 81 L.Ed. 70, 57 S.Ct. 96 (1937). This latter inquiry has a further corollary that the federal question must be a real and substantial one. *Benz v. New York State Thruway Authority*, 369 U. S. 147, 7 L.Ed. 2d 634, 82 S.Ct. 674 (1961); and that the result of the case is dependent upon the construction of the federal law in question. *Campbell v. Chase Nat. Bank*, (CA 2 N.Y.) 71 F.2d 669, 94 ALR 708, cert. den. 293 U. S. 592, 79 L.Ed. 686, 55 S.Ct. 108 (1935). A preliminary step in determining the existence of a substantial federal question is whether the record below demonstrates that the federal question actually arose or was presented in the case. *Durley v. Mayo*, 351 U. S. 277, 100 L.Ed. 1178, 76 S.Ct. 806, reh. den. 352 U. S. 859, 1 L.Ed.2d 69, 77 S.Ct. 22 (1957). It is axiomatic that the record must also demonstrate that the state court actually ruled on the federal question so that it was necessary for a determination of the case.

The Supreme Court will not review judgments of state courts which decisions rest upon adequate and independent state grounds. The obvious purpose of this rule is to preserve the demarcation between state and federal judicial systems so that the Supreme Court's power is limited to issues concerning federal questions.

In accordance with Rule 24 of the Supreme Court Rules of Procedure the Respondent asserts that the Petitioner's request for a writ of certiorari should be dismissed. It is patently clear that the decision below was not grounded on a substantial federal question and was in fact decided on a state law basis. The Court of Special Appeals after reviewing briefly the history of this cause presented the nexus of their decision as follows:

> We have treated the merits of the jurisdiction question even though we need not have. The chancellor below found as a fact that Mrs. Schwartz had appeared generally in the Florida proceeding. The test by which that finding of fact must be reviewed is set forth in Md. Rule 1086, the clearly erroneous rule, *Renwick*, 24 Md. App. at 282-283, and we do not find that finding of fact to be clearly erroneous.

(Petitioner's brief, page A-5).

It is clear that the essential and crucial basis of the decision was in the dual areas of inquiry concerning jurisdiction and waiver and estoppel. These were decided at the trial level on a purely factual basis which the Court of Special Appeals held not to be 'clearly erroneous' within Rule 1086 of the Maryland Rules of Procedure. The Petitioner continues to challenge these findings of fact despite the prohibition of such procedure in the Supreme Court.

The Full Faith and Credit Clause was only the vehicle by which the decision rendered on the above basis was applied. It was not the basic issue in the case. It, in fact, was not even necessary to the decision in the case as may be easily ascertained from the above quoted portion of the opinion of

the Court of Special Appeals. The Petitioner concedes this point on page 6 of her brief wherein she states that the factual question of jurisdiction was the basis of the decision by the Court of Special Appeals.

Accordingly, the Respondent respectfully requests that this Motion to Dismiss be granted.

CONCLUSION

This cause was decided below on the basis of jurisdiction and waiver and estoppel. The Full Faith and Credit Clause was not the substantial or essential basis for the decision reached at either the trial or the appellate level. This case does not present a change of circumstances case, but rather a case of concurrent jurisdiction wherein each state had an equal right to act. As such, it does not present a proper cause for consideration by the Supreme Court of the United States on the basis of a writ of certiorari.

Accordingly, the Respondent respectfully requests that his Motion to Dismiss be granted or in the alternative that this Honorable Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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